STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES STUBBLEFIELD,

Defendant-Appellant.

UNPUBLISHED
March 19, 2002

No. 228544
Wayne Circuit Court
LC No. 99-004188

Before: O'Connell, P.J., and White and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction, following a jury trial, of one count of second-degree criminal sexual conduct (CSC II) (sexual contact with a person under age thirteen), MCL 750.520c(a). The trial court sentenced defendant to a term of five to fifteen years' imprisonment. We affirm.

Defendant first argues that the trial court erred in failing to instruct the jury, sua sponte, regarding the lesser offense of fourth-degree criminal sexual conduct, (CSC IV), MCL 750.520e. Defendant failed to properly preserve this issue for our review because he did not request the instruction below. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Moreover, defendant has waived review of this issue because trial counsel expressed satisfaction with the trial court's instructions. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Specifically, at the commencement of proceedings on May 24, 2000, the trial court indicated its intention to give the "general jury instruction," and inquired of both parties regarding whether other instructions were requested. Defense counsel indicated that he was not seeking any additional instructions. After the prosecutor asked the court whether, by its use of the word "general" it meant the instruction on CSC II, the trial court responded in the affirmative. Defense counsel then stated, "[t]hat's all it is." Notably, defendant did not exercise this opportunity to request an instruction on CSC IV. Further, after reading the instructions to the jury, the trial court inquired of both parties whether it had "complied with the reading of the jury instructions." In response, defense counsel expressed his satisfaction with the instructions by stating "Yes, Judge." Thus, defendant has waived review of this issue. *Id.* at 216.[1]

[1] In any event, it is well-settled that a trial court "generally has no duty to instruct the jury sua (continued…)

Defendant next argues that there was insufficient evidence to support his conviction. A criminal defendant need not take any special steps to preserve an issue regarding a challenge to the sufficiency of the evidence. *People v Cain*, 238 Mich App 95, 116-117; 605 NW2d 28 (1999).[2] To determine whether sufficient evidence has been presented to sustain a conviction, this Court must view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have concluded that the essential elements of the crime were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). Because the standard of review is deferential, we are required to draw all reasonable inferences in support of the jury verdict. *Id*. at 400. "Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove the elements of a crime. *People v Nelson*, 234 Mich App 454, 459; 594 NW2d 114 (1999).

A conviction under MCL 750.520c(a) requires proof beyond a reasonable doubt that sexual contact occurred, *People v VanderVliet*, 444 Mich 52, 76; 508 NW2d 114 (1993) modified 445 Mich 1205 (1994), and that the victim was under the age of thirteen. To prove sexual contact, the prosecutor must prove that the contact "can reasonably be construed as being for the purpose of sexual arousal or gratification." *Id.* at 76. In the instant case, we are satisfied that a rational trier of fact could have concluded that the elements of CSC II were proven beyond a reasonable doubt. First, the evidence was uncontradicted that the victim was four years old at the time of the incident. Second, the victim testified that defendant engaged in sexual contact with her. The credibility of the victim's testimony was a matter for the jury to decide. *People v Jackson*, 178 Mich App 62, 65; 443 NW2d 423 (1989). Moreover, a reasonable inference can be drawn from the record evidence that defendant touched the victim for the purpose of sexual gratification or arousal.[3]

Finally, defendant argues that the imposition of five to fifteen years' imprisonment for the CSC II conviction was an abuse of the trial court's discretion because the sentence violated the principle of proportionality. Because the offense giving rise to defendant's conviction occurred on April 5, 1999, the legislative sentencing guidelines apply. MCL 769.34(2); *People v Reynolds*, 240 Mich App 250, 254; 611 NW2d 316 (2000).

(…continued)

sponte regarding all lesser included offenses." *People v Reese*, 242 Mich App 626, 629, n 2; 619 NW2d 708 (2000), lv gtd 465 Mich 851 (2001), citing *People v Henry*, 395 Mich 367, 374; 236 NW2d 489 (1975). See also *People v Ora Jones*, 395 Mich 379, 386, 393; 236 NW2d 461 (1975).

[2] In the instant case, defendant moved for directed verdict shortly before the jury rendered its verdict.

[3] Specifically, the victim testified that defendant took off all of his clothes except his shirt and then disrobed the victim until she was left wearing only a shirt. Defendant sat the victim on his penis and slid her up and down on his penis while her legs were apart. During this time, defendant's penis touched the victim's private parts. Additionally, defendant wanted the victim to put his penis in her mouth but after she refused he put a dildo in her mouth so far that it made her choke. Defendant, then naked, chased the victim through the house. Thereafter, defendant made the victim watch a pornographic movie.

A review of the sentencing information report (SIR) reflects that defendant was assessed a total offense variable (OV) score of twenty. The trial court assessed defendant ten points under offense variable four (OV 4), MCL 777.34(1) for "psychological injury to the victim," and further assessed defendant ten points under offense variable ten (OV 10) for "exploitation of a vulnerable victim." MCL 777.40(1). It does not appear from the record that defendant has a prior felony criminal record, therefore his total prior record variable (PRV) score was zero. The legislative guidelines recommended a minimum sentence in the range of zero to seventeen months. MCL 777.64. As noted, the trial court departed from the legislative sentencing guidelines' recommended range and imposed a sentence of five to fifteen years' imprisonment.

On appeal, defendant does not argue that the trial court did not have substantial and compelling reasons to depart from the recommended guidelines range. MCL 769.34(3); *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001). Indeed, defendant merely argues that his sentence violates the principle of proportionality. However, we note that in the SIR departure form filed in the lower court, the trial court listed the following reasons for departing from the guidelines' recommended range.

> There are substantial and compelling reasons to depart[:] (1) [u]se of a sexual aid in a sexual incident[,] (2) [defendant] [i]nsert[ed] dildo in child's mouth until she almost choked[,] (3) [p]redatory conduct after sexual act of sliding child on defendant's penis[,] (4) [t]he child fled to [another] room hiding under the covers and defendant pursued her, coming in naked after her[,] (5) [t]he child fled to [yet] another room and hid under the bed. Defendant ran after her and made her watch a pornographic movie featuring a boy and girl in the forest naked; the [boy] wiped penis on [girl's] face.

Although defendant does not argue this issue on appeal, we are of the view that the above factors were objective and verifiable[4] and that the trial court did not abuse its discretion in holding that they constituted substantial and compelling reasons to depart from the recommended guidelines range. MCL 769.34(3); *People v Babcock*, 244 Mich App 64, 75-76; 624 NW2d 479 (2000). Further, we are satisfied that the circumstances of this offense, specifically that (1) defendant used a sexual aid in this heinous offense, which (2) defendant placed in the four-year-old victim's mouth until she nearly choked, as well as (3) defendant's conduct of repeatedly chasing the victim after she attempted to escape and, (4) making her view a pornographic movie are not "offense characteristics[s] or offender characteristic[s]" already taken into account by the guidelines. MCL 769.34(3)(b).

To the extent that defendant maintains that his sentence was disproportionate, we note that our Supreme Court has recently suggested in dictum, by way of footnote, that even where a reviewing court concludes that the trial court had substantial and compelling reasons to deviate from the guidelines' recommended range, the reviewing court may still consider whether the

[4] Objective and verifiable factors are those "'actions or occurrences which are external to the minds of the judge, defendant, and others involved in making the decision . . . [that are] capable of being confirmed.'" *People v Fields*, 448 Mich 58, 66; 528 NW2d 176 (1995) (ellipses and alteration in the original), quoting *People v Krause*, 185 Mich App 353; 460 NW2d 900 (1990).

departure from the guidelines' range was proportionate. *Hegwood*, *supra* at 437, n 10. In this case, we are satisfied that the extent of the departure from the guidelines' range was proportionate not only to the particularly disturbing circumstances surrounding this odious attack on the four-year-old victim, but also to the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). See also *People v Rice (On Remand)*, 235 Mich App 429, 446; 597 NW2d 843 (1999) (holding that trial court may properly consider severity and nature of offense when imposing sentence).

Affirmed.

/s/ Peter D. O'Connell
/s/ Helene N. White
/s/ Jessica R. Cooper